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OBLON, SPIVAK, MCCLELLAND MAIER & NEUSTADT, P.C. 1940 DUKE STREET ALEXANDRIA, VA 22314			EXAMINER THAKUR, VIREN A	
			ART UNIT 1794	PAPER NUMBER
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

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Office Action Summary	Application No. 10/583,558	Applicant(s) IWASAKI ET AL.	
	Examiner Viren Thakur	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-10 is/are pending in the application.
 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-10 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>9/21/07; 11/22/06; 9/19/06</u> | 6) <input type="checkbox"/> Other: ____ |

DETAILED ACTION

Priority

1. Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. **Claims 1-10 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.**

Instant claim 1 recites the limitation "from 0.0001 to 20 weight percent, in terms of equivalent glucose amount, and less than 0.05 weight percent, in terms of equivalent fructose amount, of a carbohydrate." The claim is unclear as to whether this is the percentage component of a carbohydrate that comprises a glucose equivalent and a fructose equivalent ingredient, or whether the percentage is the amount of a carbohydrate per the total of the packaged beverage. In light of this discussion, the same clarification is requested for the percentage of the non-polymer catechins.

Regarding claim 7, the phrase "such that" renders the claim indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. See MPEP § 2173.05(d).

Claim Rejections - 35 USC § 102

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

5. **Claims 1,3,5-7 are rejected under 35 U.S.C. 102(b) as being anticipated by Ohishi et al. (US 20030077374 A1).**

Regarding instant claim 1, Ohishi et al. disclose a packaged beverage (Paragraph 0044 and 0045) comprising green tea extract comprising non-polymer catechins from 0.092 to 0.5 percent (Paragraph 0012), which falls within the range of 0.01 and 1 percent, as claimed; quinic acid (Paragraph 0013); a carbohydrate such as glucose at between 0.05 to 0.5 percent (Paragraph 0041), which falls within the claimed range of 0.0001 to 15 percent. It is noted that since glucose is less sweet when compared to fructose, that 0.05 percent glucose would inherently have been less than 0.05 weight percent in terms of equivalent fructose amount. Glucose is also well known to be a monosaccharide.

Regarding the pH of instant claims 1 and 5, Ohishi et al. disclose wherein the pH

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is from 2 to 7, thus encompassing the claimed range of 2 to 6; and in an example, Ohishi et al. teach the pH of 3.2 (Paragraph 0038), thus teaching a beverage having a pH between 2 and 6 and 2 and 5.

Regarding the oxalic acid of claims 6 and 7, Ohishi et al. teach that if the quinic acid contains oxalic acid, then the amount of oxalic acid should not exceed the content of quinic acid (Paragraph 0033). Ohishi et al. teach the ratio of quinic acid to non-polymer catechins as between 0.01 to 1 and depending on the catechins used, between 0.01 and 0.15 (paragraph 0031) when green tea extract is used. Since the ratio of quinic acid to non-polymer catechins is between 0.01 to 0.15, then the ratio of oxalic acid to non-polymer catechins would also be a similar ratio. Therefore, Ohishi et al. would encompass the claimed ratio of not greater than 0.2, as recited in instant claims 6 and 7. Further regarding instant claim 7, Ohishi et al. teach the concentrate comprising between 30 to 98 percent non-polymer catechins or preferably 40 to 90 percent (Paragraph 0036), which falls within the claimed range of 20 to 90 percent.

Regarding instant claim 3, Ohishi et al. teach non-tea based beverages (Paragraph 0028).

Claim Rejections - 35 USC § 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

8. **Claims 1,3,5-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ohishi et al. (US 20030077374 A1) in view of Shallenberger (Advanced Sugar Chemistry).**

Ohishi et al. is taken as cited above, with respect to claims 1, 3 and 5-7.

With respect to instant claim 1, Ohishi et al. teach monosaccharides such as glucose used at 0.05 percent, as discussed above. Ohishi et al. teach as examples other sweeteners such as oligosaccharides and other disaccharides such as fructose. Nevertheless, Ohishi et al. does not limit the sweeteners to those taught in paragraph 0041 but rather teaches these as examples of sweeteners used for simply that purpose, to sweeten the beverage.

Nevertheless, Shallenberger is relied on as an additional teaching of oligosaccharides (which encompass disaccharides) such as lactose, that have a sweetness less than glucose and thus also less than fructose (See Page 259, Table 10.2). As such, the use of lactose has been well known in the art for the

purpose of sweetening food products. Therefore, it would have been obvious to one having ordinary skill in the art to substitute one known sweetener such as glucose for another known sweetener such as lactose, since the art has recognized that various types of sweeteners such as monosaccharides, disaccharides and oligosaccharides for the purpose of sweetening a food product. Regarding the glucose equivalence and the fructose equivalence, if an oligosaccharide that had a dextrose (glucose) equivalence greater than fructose, it would have been obvious that less of the oligosaccharide would have been required to provide the requisite degree of sweetness. Therefore, based on these teachings and knowledge of one having ordinary skill in the art, to employ the specific amount of the other sweeteners such as disaccharides and oligosaccharides would have been obvious for the purpose of achieving the desired result of a specific level of sweetness. Such a modification would have been obvious depending on the amount of masking of the bitterness is required in the beverage of Ohishi et al. Therefore, to use other sweeteners would not have provided a patentable feature over the prior art.

Claims 3 and 5-7 are rejected as applied above.

9. **Claims 8 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ohishi et al. (US 20030077374 A1).**

Ohishi et al. are taken as cited above. Regarding instant claim 8, Ohishi et al. teach a ratio of oxalic acid to non-polymer catechins from 0.01 to 0.15, as

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discussed above. This encompasses points within the instantly claimed range. Nevertheless, the amount of quinic acid and thus the amount of oxalic acid would have been obvious for the purpose of preventing adverse aftertaste to the beverage (Paragraph 0033). Therefore to ensure that the oxalic acid is at a ratio such at 0.01 in terms of the amount of non-polymer catechins would have been obvious to one having ordinary skill in the art for the purpose of preventing an adverse aftertaste to the beverage.

Regarding instant claim 10, Ohishi et al. teach using PET bottles for the beverage (Paragraph 0045) and further teach that it has been known in the art to use transparent packaging, wherein said packaging is a PET bottle. Therefore, to use a transparent PET bottle would have been within the ordinarily capabilities of one skilled in the art, since Ohishi et al. teach that it was recognized in the art to use transparent PET bottles for packaging beverages and since Ohishi et al. teach a PET bottle.

- 10. Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ohishi et al. (US 20030077374 A1) in view of Kuznicki et al. (US 5681569), Ekanayake et al. (US H001628 H) and Broz (US 20020197376).**

Ohishi et al. are taken as cited above in paragraphs 5, 8 and 9.

Regarding the sodium and potassium ions, Ohishi et al. further teach sodium ions as a result of adding a salt such as sodium polyphosphate, at between 0.01

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to 0.5 percent (Paragraph 0043), which is within the claimed range of 0.001 to 0.5 percent.

However, Ohishi et al. are silent in teaching wherein the packaged beverage also contains from 0.001 to 0.2 percent of potassium ions.

It is noted that applicants' specification teaches on pages 10, paragraph 0016, that the sodium and potassium ions exist in fruit extract and tea extract. As such, Ohishi et al. teach a tea extract and further teach fruit extract beverages (Paragraph 0039) and using tea extract in the beverage. Therefore, this teaches the skilled artisan that there would have been a reasonable expectation that the fruit extract and tea extract of Ohishi et al. would also have contained sodium and potassium ions, for providing a specific taste to the beverage. In any case, Ohishi et al. also recognize that bitterness and astringency is a problem with large amounts of catechins (Paragraph 0008). Similar to applicants, Ohishi et al. teach reducing the bitterness and astringency of the beverage (See Abstract and Paragraph 0009). The inorganic salts taught by Ohishi et al., such as sodium metaphosphate and sodium polyphosphate have been well known to be used as buffers for controlling taste in beverages. Ekanayake et al. is cited as further evidence of salts that act as buffers for tea extract, which is used for beverages (Column 2, Lines 16-17 and Lines 41-44). Broz (US 20020197376) is also cited for the use of sodium and potassium salts that act as buffers to improve the taste of a beverage.

Kuznicki et al. is relied on for teaching a beverage that contains tea solids, electrolytes and carbohydrates to provide improved drinkability (Column 2, Lines 45-48) and for improved cellular hydration. Kuznicki et al. also teach that electrolytes such as sodium and potassium ions are present in fruit juices and in the tea extract, and further teach wherein the percentage of potassium ions is between 0.005 to 0.08 percent (Column 5, Lines 11-19), which is within the instantly claimed range. Kuznicki et al. also teach the combination of the potassium ion with the sodium ions, in a packaged beverage (Column 9, Lines 20-22). As recognized by the prior art, the sodium and potassium salts also act to stabilize and buffer the beverage, thus improving the taste of the beverage, and Kuznicki et al. further teach that the sodium and potassium ions aid facilitate cellular hydration (Column 5, Lines 24-28) and are the major physiological electrolytes (Column 4, Line 66 to Column 5, Line 3). Thus including the electrolytes in a sports drink, such as that of Kuznicki et al. aids in replacing one's electrolytes after physical activity. The beverages of Kuznicki et al. and Ohishi et al. are similar in that both teach a beverage comprising catechins and fruit extract and teach improving the drinkability of the beverage. The beverage of Kuznicki et al. is drawn to a sports drink type beverage and Ohishi et al. similarly teach making packaged beverages such as sports beverages (Paragraph 0039). Therefore, it would have been obvious to one having ordinary skill in the art to apply the potassium ions, in combination with the sodium ions already employed by Ohishi et al., for the purpose of improving the taste of the

beverage, since it is known in the art, as evidenced by Ekanayake et al. that salts act as buffers and control the taste associated with a beverage as a result of their ability to control the stability and quality of the food product. Since Ohishi et al. teach making sports beverages, it would further have been obvious to one having ordinary skill in the art to use the potassium and sodium salts, as taught by Kuznicki et al. for the purpose of facilitating cellular hydration, thus increasing the physiological effects of the beverage by facilitating replenishment of one's electrolytes after physical activity. Furthermore, to employ a specific amount of the potassium ions, such as that taught by Kuznicki et al. would have been obvious to the ordinarily skilled artisan since it has been recognized in the art that such salts can control the taste and stability of the beverage, while also facilitating the cellular hydration of the nutrients of the beverage while replenishing the body's electrolytes. Therefore to use a particular amount would have been obvious for the purpose of achieving the desired taste, stability and hydration levels without drawing water out of the body, and thus would not have provided a patentable feature over the prior art, absent any clear and convincing evidence to the contrary.

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- 11. Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ohishi et al. (US 20030077374 A1) in view of Tsai et al. (US 4946701) and Teach Me Tea Cha.**

The prior art is taken as cited above. Regarding instant claim 9, it is interpreted that the beverage is in a form that would allow for ingestion of at least 300 mg of the non-polymer catechins per day. It is noted that Ohishi et al. teach having a high concentration of catechins (Paragraph 0009) and also teach that in the past 4 to 5 cups a day of tea would have to have been consumed to achieve the physiological effects of the catechins (Paragraph 0005).

Tsai et al. teach that it has been well known in the art to provide a packaged beverage with at least 300 mg of catechins, as shown in examples 1 and 5, wherein the beverages contain 120 grams (152.6 x 95.7%) and 3.5 grams respectively. Tsai et al. similarly recognize that catechins have physiological benefits (Column 1, Lines 16-24).

Teach Me Tea Cha similar teaches that the catechins have physiological benefits, such as an anti-tumor effect. Teach Me Tea Cha also teach that a person who drinks 10 cups of green tea per day consumes between 0.6 to 1.2 grams of catechins. Ohishi et al. teach that in order to receive the full physiological effects that 4 to 5 cups of tea would have to have been consumed. If 5 cups of the tea of Teach Me Tea Cha was consumed, 0.3 to 0.6 grams of catechins would have been consumed, which is equivalent to 300 to 600 milligrams. Therefore, it would have been obvious to one having ordinary skill in

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the art that the beverage of Ohishi et al. would have permitted at least 300 mg of catechins per day since Ohishi et al. desire to have an easier means to ingest a larger amount of catechins (Paragraph 0004-0005) which would still provide the full physiological effects.

Double Patenting

12. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

13. **Claims 1 and 3-10 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 3-**

5 and 7-8 of copending Application No. 10/582873 in view of Ohishi et al. (US 20030077374).

Claim 1 of copending Application No. 10/582873 encompasses the instantly claimed percentage of non-polymer catechins, carbohydrate and pH. The copending claim is silent in teaching wherein the carbohydrate comprises at least one member selected from the group consisting of a monosaccharide, a disaccharide or an oligosaccharide or a conjugated polysaccharide. Ohishi et al. teach examples of sweeteners to be used for the packaged beverage, comprising non-polymer catechins such as glucose which is a monosaccharide, and fructose which is a disaccharide. Ohishi et al. further teaches the use of oligosaccharides. Thus, it is noted that such sweeteners have been well known in the art for the purpose of adding a specific level of sweetness to the beverage and thus to employ such known components for the purpose of adding sweetness, which has been known in the art, would not have provided a patentable feature over the prior art.

Regarding instant claims 6-8, copending claim 5 teaches wherein the ratio of quinic acid to non-polymer catechins is from 0.0001 to 0.16, but is silent in the ratio of oxalic acid to non-polymer catechins.

Ohishi et al. teach that if the quinic acid contains oxalic acid, then the amount of oxalic acid should not exceed the content of quinic acid (Paragraph 0033). Ohishi et al. teach the ratio of quinic acid to non-polymer catechins as between 0.01 to 1 and depending on the catechins used, between 0.01 and 0.15

(paragraph 0031). Since the ratio of quinic acid to non-polymer catechins is between 0.01 to 0.15, then the ratio of oxalic acid to non-polymer catechins would also be a similar ratio. Therefore at a ratio of 0.01, Ohishi et al. would encompass the claimed ratio of not greater than 0.2, as recited in instant claims 6 and 7. Further regarding instant claim 7, Ohishi et al. teach the concentrate comprising between 30 to 98 percent non-polymer catechins or preferably 40 to 90 percent (Paragraph 0036), which falls within the claimed range of 20 to 90 percent. Regarding instant claim 8, Ohishi et al. teach a ratio of oxalic acid to non-polymer catechins from 0.01 to 0.15, as discussed above. This encompasses points within the instantly claimed range. Nevertheless, the amount of quinic acid and thus the amount of oxalic acid would have been obvious for the purpose of preventing adverse aftertaste to the beverage. Therefore to ensure that the oxalic acid is at a ratio such as 0.01 in terms of the amount of non-polymer catechins would have been obvious to one having ordinary skill in the art for the purpose of preventing an adverse aftertaste to the beverage.

This is a provisional obviousness-type double patenting rejection.

- 14. Claims 1 and 3-10 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4,8,9,11-14,18,21,25-29 of copending Application No. 11/258892 in view of Ohishi et al. (US 20030077374).**

Claims 1-4, 8, 9, 11-14 and 18 of copending Application No. 11/258892 teach a non-tea based beverage having a pH from between 2 to 6, comprising 0.03 to 0.6 percent non-polymer catechins, which falls within the instantly claimed range; a sweetener at between 0.0001 to 20 percent (copending claim 3 and 21), thus encompassing the instantly claimed range and at between 0.001 to 15 percent (copending claims 11) which falls within the instantly claimed range. The copending application further teaches sodium ions at between 0.001 and 0.2 and potassium ions at between 0.001 and 0.1 (copending claims 2, 12 and 21); a ratio of oxalic acid to non-polymer catechins at between 0 to 0.02 (copending claims 1, 11) which falls within the instantly claimed range. Copending claims 1 and 11 are silent in teaching wherein the carbohydrate comprises at least one member selected from the group consisting of a monosaccharide, a disaccharide or an oligosaccharide or a conjugated polysaccharide. Ohishi et al. teach examples of sweeteners to be used for the packaged beverage, comprising non-polymer catechins such as glucose, which is a monosaccharide, and fructose, which is a disaccharide. Ohishi et al. further teaches the use of oligosaccharides. Thus, it is noted that such sweeteners have been well known in the art for the purpose of adding a specific level of sweetness to the beverage and thus to employ such known components for the purpose of adding sweetness, which has been known in the art, would not have provided a patentable feature over the prior art.

Regarding copending claims 21 and 25-29, said copending claims are silent in the ratio of the oxalic acid to non-polymer catechins being not greater than 0.2 and 0.05. Ohishi et al. further teach the ratio of quinic acid to non-polymer catechins as between 0.01 to 1, preferably from 0.01 to 0.5, thus falling within the claimed range (Paragraph 0032). Regarding the oxalic acid, Ohishi et al. teach that if the quinic acid contains oxalic acid, then the amount of oxalic acid should not exceed the content of quinic acid (Paragraph 0033). Furthermore, since the ratio of quinic acid to non-polymer catechins is between 0.01 to 0.1 and between 0.01-0.16 when pure green tea extract is used, the ratio of oxalic acid to non-polymer catechins would also be a similar ratio (Paragraph 0031 and 0033). Therefore at a ratio of 0.01, Ohishi et al. would encompass the claimed range of not greater than 0.06. Nevertheless, the amount of quinic acid and thus the amount of oxalic acid would have been obvious for the purpose of preventing adverse aftertaste to the beverage. Therefore to ensure that the oxalic acid is at a ratio such as 0.01 in terms of the amount of non-polymer catechins would have been obvious to one having ordinary skill in the art for the purpose of preventing an adverse aftertaste to the beverage.

This is a provisional obviousness-type double patenting rejection.

15. **Claim 1, 3-8 and 10 is provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-2**

and 6-11 of copending Application No. 10/583556 in view of Ohishi et al. (US 20030077374).

Although the claims are not identical they are not patentably distinct from each other because claims 1 encompass the limitations of claim 1 of the instant application. Regarding the sweetener, the copending application is silent in teaching the sweetener selected from the group consisting of a monosaccharide, a disaccharide an oligosaccharide or a conjugated polysaccharide. The copending application teaches a sweetener and Ohishii et al. teach mono-, di- and oligosaccharides used as sweeteners for a beverage containing non-polymer catechins and wherein the sweetener is used from between 0.05 to 1 percent, which encompasses the claimed range (Paragraph 0041). Thus, it is noted that applicant is not the first to have employed saccharide sweeteners for a beverage and since the use of mono-, di- and oligosaccharides to sweeten a beverage has been recognized as part of the ordinarily capabilities of one skilled in the art, it would have been obvious to use a sweetener, as that taught by Ohishii et al. to sweeten a beverage. Regarding the pH, instant claim 1 is silent in teaching a specific pH, however Ohishi et al. teach a pH from 3 to 7 (Paragraph 0038). The pH is adjusted based on the required taste and chemical stability and thus to use a pH within this range would have been obvious for the purpose of obtaining the desired taste and stability to the beverage. Regarding instant claim 3, the copending application teaches using the composition in a soft drinks and juice beverages, as recited in copending claims 10-11. Regarding instant claims 6-8,

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the copending application discloses a claimed range of oxalic acid to non-polymer catechins, which is less than 0.05, as recited in copending claim 1.

Regarding instant claim 7, the copending application discloses wherein the concentrate comprises from 20 to 90 percent of non-polymer catechins based on a solid content thereof.

This is a provisional obviousness-type double patenting rejection.

Conclusion

16. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Igoe (Dictionary of Food Ingredients) and Food Additives Data Book are cited as further evidence of the ability of disodium phosphate and sodium polyphosphate to aid in improving the quality and stability of food products.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Viren Thakur whose telephone number is (571)-272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Carol Chaney can be reached on (571)272-1284. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Viren Thakur
Examiner
Art Unit: 1794

Steve Weinstein
STEVE WEINSTEIN
PRIMARY EXAMINER
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1/29/07